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Legal Systems of Regional Economic Integration

Stefan A. Riesenfeld

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By STEFAN A. RIESENFELD*

I. The Importance of the Legal Framework for Regional Integration

Regional economic integration has become one of the most important international phenomena since the end of World War II. The disarray of the world economic system caused by the mass destruction of production facilities and the disruption of established trade patterns as well as the desire to eliminate traditional national rivalries and antagonisms gave a strong impetus to the formation of integrative schemes on a regional level as a palliative against military aggression and an instrument of economic growth and development. Hence, beginning with the establishment of the European Coal and Steel Community in 1952,[1] the creation of free trade areas and common markets has become a reality[2] or at least the subject of discussions and negotia-

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* Stefan A. Riesenfeld is Emanuel S. Heller Professor of Law, University of California, Berkeley. This article was written as a national report on topic IV. A for the IX Congress of Comparative Law, to be held at Teheran in Sept. 1974. Other national reports are published in a separate volume *The Law in the United States of America in Social and Technological Revolution* (1974).

1. Treaty Instituting the European Coal and Steel Community, 18 April 1951, 261 United Nations Treaty Series [hereafter "U.N.T.S."]

2. Treaty Establishing the European Economic Community, 25 March 1957, 298 U.N.T.S. 11; Treaty Establishing the European Atomic Energy Community, 25 March 1957, 298 U.N.T.S. 169; Convention Establishing the European Free Trade Area, 4 Jan. 1960, 370 U.N.T.S. 5; Treaty Establishing a Free Trade Area and Instituting the Latin American Free Trade Association, 18 Feb. 1960, in Inter-American Institute of International Studies, *Instruments Relating to the Economic Integration of Latin America* [hereafter "*Instruments*"] 207 (1968); General Treaty for Central American Economic Integration, 13 Dec. 1960, in *Instruments* 23; New Zealand-Australia Free Trade Agreement, 31 Aug. 1965, 554 U.N.T.S. 169; Treaty Establishing a Customs and Economic Union of Central Africa, 8 Dec. 1964, 5 Int'l Legal Materials 699; Charter of the Union of Central African States, 2 April 1968, 7 Int'l Legal Materials 725; Articles of Association for the Establishment of an Economic Community of West Africa, 4 May 1967, 595 U.N.T.S. 287; Treaty for

tions in nearly every portion of the globe, especially in Europe, Africa, South and Central America, Australia and the Pacific.[3] Thus it is not surprising that the subject of regional integration in general or particular aspects thereof have become a favored topic of studies by economists,[4] political scientists[5] and jurists, and prompted a totally unmanageable floor [sic] of publications. A long list of recent periodicals is especially devoted to economic, political or legal problems of regional integration[6] and the controlling legal instruments are ana-

East African Cooperation, 6 June 1967, 6 Int'l Legal Materials 932; Agreement Establishing the Caribbean Free Trade Association, 10 April 1968, 7 Int'l Legal Materials 935; Agreement on Andean Subregional Integration, 8 Int'l Legal Materials 910; Treaty Establishing the Caribbean Community, 4 July 1973, 12 Int'l Materials 1033, pursuant to Georgetown Agreement of 12 April 1973, 14 *Derecho de la Integración* 187 (1973).

3. On the plans for a Pacific Free Trade Area, see especially Kojima, ed., *Conference on Pacific Trade & Development* (1969); Kojima, *Japan and a Free Trade Area* (1971).

4. See e.g. Balassa, *The Theory of Economic Integration* (1961); Balassa, *Economic Development and Integration* (CEMLA 1965); Frank, *The European Common Market, An Analysis of Commercial Policy* (1961); Jaber, "The Relevance of Traditional Integration Theory to Less Developed Countries," 9 *J. Common Market Stud.* 254 (1971); Krauss, "Recent Developments in Customs Union Theory: An Interpretive Survey," 10 *J. Econ. Literature* 413 (1972); Linder, "Customs Unions and Economic Development," in Wionczek, ed., *Latin American Economic Integration* (1966); Lipsey, "The Theory of Customs Unions: A General Survey," 70 *Econ. J.* 496 (1960); Meade, *The Theory of Customs Unions* (1956); Scitovsky, *Economic Theory and Western Integration* (1958); Tinbergen, *International Economic Integration* (1954); Viner, *The Customs Union Issue* (1950); see also Carnoy, *Industrialization in a Latin American Common Market* (Brookings Inst. 1972); Grunwald, Wionczek and Carnoy, *Latin American Economic Integration and U.S. Policy* (Brookings Inst. 1972); Instituto Italo-Latinoamericano en colaboración con el Banco Interamericano de Desarrollo, *Los Procesos de Integración en América Latina y Europa* (1970).

5. Barrera and Haas, *The Operationalization of Some Variables Related to Regional Integration*, 23 *Int'l Organization* 150 (1969): Caporaso, "Theory and Method in the Study of International Integration," 25 *Int'l Organization* 228 (1971); Dahlberg, "Regional Integration; Neo-Functional versus a Configurative Approach," 24 *Int'l Organization* 122 (1970); Hansen, "Regional Integration: Reflections on a Decade of Theoretical Efforts," 21 *World Politics* 242 (1969); Kaiser, "Toward the Copernican Phase of Regional Integration Theory," 110 *J. Common Market Stud.* 207 (1972); Lindberg, "Political Integration as a Multidimensional Phenomenon Requiring Multivariate Measurement," 24 *Int'l Organization* 649 (1970); Nye, "Comparing Common Markets, A Revised Neo-Functionalist Model," 24 *Int'l Organization* 796 (1970); Scheingold, "Domestic and International Consequences of Regional Integration," 24 *Int'l Organization* 978 (1970); Schmitter, "A Revised Theory of Regional Integration," 24 *Int'l Organization* 836 (1970); Schmitter, "Central American Integration: Spill-over, Spill-around or Encapsulation," 9 *J. Common Market Stud.* 1 (1970); Lindberg and Scheingold, *Europe's Would-be Polity* (1970); Cantori and Spiegel, "The Analysis of Regional International Politics: The Integration Versus the Empirical Systems Approach", 27 *Int'l Organization* 465 (1973).

6. *Boletín de la Integración* (1965—); *Common Market Law Review* [hereinafter "*C.M. L. Rev.*"] (1963—); *Derecho de la Integracion* (1967-); *Europarecht* (1966—); *Journal of Common Market Studies* (1962-); *Revista de la Integración* (1967—); *Revue du Marché Commun* (1958—); *Revue Trimestrielle de Droit Européen* (1965—); *Rivista di*

lyzed in mammoth commentaries and treaties.[7] Of course, it is impossible within the framework of a single article to present an exhaustive assessment of the legal problems which have arisen during two decades of operation or regional integrative systems in different areas of the world. Yet it seems fruitful to attempt a general comparative analysis of the various legal structures of regional economic integration and to identify legal factors which are necessary for or at least conducive to successful operation of such schemes. Judge Pescatore's brilliant lectures on the law of integration[8] furnish an excellent model for such efforts.

Needless to say, a comparative analysis of legal frameworks for international regional integration is predicated on the assumption that legal factors play an important role in the process of integration and they, as well as political and economic matters, are essential elements of the whole picture. This does not mean that political, economic and legal components are independent sources of and forces in the whole process, but in the interplay of the components legal issues must not be ignored.

The following survey tries to identify some of the salient features of the various integrative schemes as seen by an outsider.

II. The Legal Framework of the EEC

Undoubtedly the most successful integrative scheme of our age is that of the European Economic Community. It owes its basic conception to the vision and sense for realities embodied in the celebrated Spaak Report[9] which preceded the actual negotiation of the Treaty. Although the final form of the Treaty did not incorporate all of the technical details suggested by the report and also included some special clauses insisted upon by the delegations of the individual signato-

Diritto Europeo [hereafter "*Riv. Dir. Eur.*"] (1961—); *Integration European Studies Review* (1969—).

7. See especially Ganshoff van der Meersch, Waelbroeck et al., *Droit des Communautés Européennes* (1969); Megret, Louis, Vignes and Waelbroeck, *Le Droit de la Communauté Économique Européenne* (7 vols. 1970—); Quadri, Monaco, and Trabucchi, *Trattato Institutivo della Comunata Economica Europea* (4 vols. 1965); Quadri, Monaco and Trabucchi, *della Communita Europea del Carbone e dell' Acciaio* (3 vols. 1970); Instituto Interamericano de Estadios Juridicos Internacionales, *Derecho de la Integración Latinoamericana* (1969).

8. Pescatore, *Le Droit de l'Integration* (Institut Universitaire de Hautes Etudes Internationales 1972); reviewed 21 *Am. J. Comp. L.* 792 (1973).

9. Regierungsausschuss eingesetzt von der Konferenz von Messina, Bericht der Delegationsleiter an die Aussenminister, 1956 (MAE 120 d/56).

ries,[10] the over-all scope and structure of the Treaty as well as its institutional apparatus was closely patterned on this recommended basis for the forthcoming negotiations.

Looking at the Treaty of Rome from the vantage of hindsight, the following features of the framework for integration seem to be the most salient:

a) the automatism of the gradual dismantlement of intra-community trade barriers;
b) the inclusion of a special trade regime for agriculture;
c) the creation of community organs with directly applicable law-making powers;
d) the provision for judicial control by a Community court;
e) the establishment of the framework for a common external commerial [sic] policy;
f) the provision for filling gaps in Community powers.

The following comments are designed to justify and elaborate on this selection.

A. *Automatic Dismantlement of the Intra-Community Trade Barriers*

Although today only of historical interest, the automatic disarmament of the internal tariffs by means of a series of compulsory linear reductions, as prescribed by art. 12-17, and in particular art. 14, constituted the first great achievement in the establishment of the common market. The Treaty wisely avoided the pitfalls of periodic product-by-product negotiations and utilized the initial integrative momentum[11] to achieve a fixed course of progress. Thus the timetable of the Treaty was not only kept but actually shortened. The impetus was reflected and kept alive by the special reports of the Commission on "The First Stage of the Common Market",[12] "The Action Programme of the Community for the Second Stage,"[13] and the "Initiative 1964".[14] Thus

10. Unfortunately no detailed historical study of the genesis of the Treaties of Rome is in existence.

11. On the importance of the timely use of the integrative constellation see Berg, *Zur Leistungsfähigkeit der "Gemeinschaftsmethode" der Europäischen Gemeinschafts Integration* 202 (1971).

12. European Economic Community, Commission, *The First Stage of the Common Market* (1962).

13. European Economic Community, Commission, *Action Programme of the Community for the Second Stage* (Doc. EEC/Com. (62) 300) (1962).

14. European Economic Community, Commission, Initiative 1964, summarized in 7 E.C. Bull. no. 11, p. 5 (1964).

as a result of the acceleration decisions of 12 May 1960,[15] 15 May 1962[16] and 26 July 1966,[17] the intra-community tariffs for industrial products were cut by 40% at the end of the first stage, by 60% at the end of the second stage and totally abolished on 1 July 1968. With respect to agricultural products, the abolition of intra-community barriers was somewhat retarded. The gradual establishment of common market organizations for practically all community-grown products and their transition to the single market stage resulted in a successful removal of all intra-community tariffs and quotas. The last vestiges disappeared at the end of the transitional period.[18]

B. Successful Extension of the Common Market to Agriculture

The successful completion of the common market for agriculture and the establishment of a common agricultural policy is perhaps the greatest success of the Community despite the need for a thorough revision which has emerged in recent years. The Spaak Report emphatically postulated the need for the incorporation of agriculture into the framework of the common market and clearly foresaw the magnitude and delicacy of the task.[19] The Treaty articles on agriculture took careful account of the special features to be attributed to the common market and the need for a balanced step-by-step approach in its creation.[20] It is not a matter of surprise that the development of the common agricultural policy and its actualization amounts to more than 90% of the total legal output of the Community institutions in the form of regulations, directives, decisions and adjudications[21] as well as memoranda, proposals and opinions. Today the common market for agriculture consists of nineteen separate common market organizations and a couple of trade systems for agricultural products,[22] a sub-

15. 3 O.J.E.C. 1217 (1960).

16. 5 O.J.E.C. 1284 (1962).

17. 9 O.J.E.C. 2971 (1966).

18. At the end of the transitional period a few product sectors had not yet been placed under a common market organization. Nevertheless all intra-community tariffs and quotas for these agricultural products became inoperative and the only barriers remaining were existing minimum price systems. Council Decision, 20 Dec. 1969, 1969 O.J.E.C. L 323, p. 11; see E.C. Bull. no. 2, p. 17, 21 (1970).

19. Spaak Report (German version), supra n. 9 at 48-56.

20. E.E.C. Treaty, art. 38-47.

21. A large proportion of the judgments of the Court of Justice deal with issues raised by the primary and secondary Community law pertaining to agriculture.

22. Common market organizations for agricultural products listed in Annex II exist for cereals, rice, pork, eggs, poultry, wine, fruit and vegetables, beef, milk and dairy products, fats from plant and fish, sugar, preserves of fruits and vegetables, tobacco, fishery

stantial number of which incorporate a complex support consisting of intervention purchases, variable levies on imports and subsidies to exports. The execution of the agricultural policy not only imposes a heavy burden on the consumer but also takes the lion's share of the Community expenditures[23] which are only partly covered by the income from the variable levies on imports and other agricultural levies.[24] Yet although the common agricultural policy has precipitated the Community into its worst crises and is severely threatened by the monetary chaos, it has not collapsed and has permitted a gradual restructuring of agriculture.[24a] A fair appraisal must conclude that the inclusion of agriculture within the Community framework was more a propelling force than a break and provided a cornerstone in the whole structure.

C. *Creation of Continuously Operating Community Institutions with Power to Enact Directly Applicable Legal Provisions*

The efficiency of the integration process in the EEC was greatly strengthened by the establishment of continuously operating Community institutions—the Council and the Commission—endowed with powers to enact directly applicable Community norms in the form of regulations or decisions. With respect to the more important and ba-

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products, live plants and cut flowers, hemp and flax, hops seeds and residual products listed in Annex II. In addition, systems of trade in articles manufactured from agricultural products but not listed in Annex II exist with respect to certain goods derived from cereals, milk, butter and sugar as well as for ovalbumin and lactalbumin.

23. In 1973 the total budgetary means of the Community (excluding reinserted items from prior years) amounted to 5.068k billion e.u., while the expenditures incurred during that year were estimated at 4.157 billion e.u. In other words, the current costs of the CAP amounted to 82% of the total Community expenditures. The data given are based on the 2nd Supplementary Budget for the European Communities for Budget Year 1972 (covering January and February 1973), 15 O.J.E.C. L 287, p. 32, the Final General Budget of the Communities for 1973 (covering the costs of the CAP during the remaining ten months), 15 O.J.E.C. L 307, and the Rectifying and Supplementary Budgets no. 2, 3 and 4 for 1973, 16 O.J.E.C. L 318, p. 1, L 366, p. 1 and L 367, p. 1. The budget for 1974 provides for current expenditures totalling 5.026 billion e.u., including 3.830 billion e.u. for current operation of the CAP (= 76.2%).

24. The corrected budget for 1973 estimated the income from the variable levies of the old members and from the sugar tax at .613 billion e.u., the community share of the customs duties of the old members at 1.517 billion e.u. and the income from the community share of the variable levies and customs receipts of the new members at .475 billion e.u.

24a. For the Commission's own appraisal of the achievements and further tasks of the common agricultural policy, see "Improvement of the Common Agricultural Policy," E.C. Bull. Suppl. 17/73.

sic policy questions[25] it is the Council which is vested with the ultimate law-making authority, while the Commission is responsible for taking the initiative in bringing the matters before that body. "The Commission proposes, the Council disposes." In some fields, however, the Treaty delegates rule-making powers directly to the Commission.[26] The tandem arrangement coupling Council and Commission in the law-making process has most interesting political aspects, since the Council is composed of the cabinet ministers in charge of the particular subject, while the members of the Commission are Community officers. This cooperative scheme was designed to accommodate the Community interest in the progressive development of the integration to the member state interest in political feasibility.[27]

The power to create directly applicable secondary Community law covers vast areas of Community functions, such as customs and tariffs,[28] agricultural support,[29] commercial policy,[30] competition policy,[31] transportation policy[32] and economic and social policy,[33] includ-

25. For a list of the Treaty provisions vesting the Council with power to act upon proposals emanating from the Commission, see Anon., "La Communauté Économique Européenne, Aspects Institutionnels," 1957 *Ann. Français de Droit International* 491, 506.

26. For a list of the Treaty provisions according independent authority to act to the Commission see ibid. 512.

27. See also Pescatore, supra n. 8 at 61. The actual process of decision-making is discussed by Heynig, "Les problèmes que pose l'amélioration des mécanismes de décision du Conseil des Communautés Européennes," 169 *Rev. du Marché Commun* 396 (1973).

28. EEC Treaty art. 28 and 111, implemented by Council Regulation no. 950/68, 28 June 1968, 11 O.J.E.C. L 172, p. 1, as last revised by Regulation no. 1/74, 17 Dec. 1973, 17 O.J.E.C. L 1, p. 1.

29. EEC Treaty art. 43, implemented by Regulation no. 729/70, 21 April 1970, 13 O.J.E.C. L 94, p. 13, on the financing of the common agricultural policy, as amended, by the basic regulations establishing common market organizations for the various product sectors and trade systems for products at higher processing stage and the many regulations governing special aspects of their operation, as mentioned in n. 3, supra.

30. EEC Treaty art. 113 and 116, implemented by Regulation no. 459/68, 5 April 1968, 11 O.J.E.C. L 93, p. 1; Regulation no. 2011/73, 24 July 1973, 16 O.J.E.C. L 206, p. 3; Regulation no. 2603/69, 20 Dec. 1969, 12 O.J.E.C. L 324, p. 25; Regulation no. 109/70, 19 Dec. 1969, 13 O.J.E.C. L 19, p. 1; Regulation no. 1023/70, 25 May 1970, 13 O.J.E.C. L 124, p. 1; Regulation no. 1025/70, 25 May 1970, 13 O.J.E.C. L 24, p. 6, as amended.

31. EEC Treaty art. 87, implemented by Regulation no. 17, 6 Feb. 1962, 5 O.J.E.C. p. 204, amended by Regulation no 2822/71, 20 Dec. 1971, 14 O.J.E.C. L 285, p. 49; no. 19/65, 2 March 1965, 8 O.J.E.C. p. 533, (as amended by Treaty of Accession); Regulation no. 2821/71 , 20 Dec. 1971, 14 O.J.E.C. L 285, p. 46.

32. EEC Treaty art. 75, implemented by Regulation no. 117/66, 28 July 1966, 9 O.J.E.C. p. 2688, amended by Regulations no. 516/72 and 517/72, 28 Feb. 1972, 15 O.J.E.C. L 67, pp. 13 and 19; Regulation no. 1017/68, 19 July 1968, 11 O.J.E.C. L 175, p. 1; Regulation no. 1018/68, 19 July 1968, 11 O.J.E.C. L 175, p. 13, amended by Regulation no. 2829/72, 28 Dec. 1972, 15 O.J.E.C. L 298, p. 16; Regulation no. 1174/68, 30 July 1968, 11 O.J.E.C. L 194, p. 1, amended by Regulation no. 2826/72, 28 Dec. 1972, 15 O.J.E.C. L 298, p. 12,

ing regional policy.[34] Of course, the Council does not always act [by] means of directly applicable regulations, but in many instances prefers to proceed by means of directives addressed to the member states prescribing actions (including legislation) to be taken. But even such directives may create rights of Community citizens directly enforceable in national tribunals.[35]

In the EEC many articles of the Treaty of Rome as well as all Community acts issued in the form of regulations are directly applicable by the national authorities and confer enforceable rights on the Community citizens. The Community law constitutes a separate legal order which to the extent of its direct applicability cannot be ignored by national authorities, even if in conflict with a national statute. The nature and effect of the direct applicability of Community law, including the so-called secondary Communist law in the form of regulations, decisions and directives (art. 189) has been the subject of a vast number of scholarly discussions[36] and of a steadily growing array of adjudications by both the Court of Justice of the European Communities and national courts. The Court of Justice first established the doctrine of direct applicability of Community law and its primary in the celebrated case of *N.V. Algemene Transport en Expeditie Ondernem-*

Regulation no. 593/69, 25 March 1969, 12 O.J.E.C. L 77, p. 49, amended by Regulation no. 514/72 and 515/72, 28 Feb. 1972, 15 O.J.E.C. L 67, p. 1, 11; Regulations no. 1191/69 and 1192/69, 26 June 1969, 12 O.J.E.C. L 156, p. 1, 8.

33. EEC Treaty art. 51, 126-128, 203 (5), implemented by Regulation no. 2396/71, 8 Nov. 1971, 14 O.J.E.C. L 249, p. 5 (reorganization of Social Fund); supplemented by Regulations no. 2397 and 2398, 8 Nov. 1971, 14 O.J.E.C L 249, p. 58, 61; Regulation no. 1408/71, 14 June 1971, 14 O.J.E.C. L 149, p. 2; Regulation no. 549/72, 21 March 1972, 15 O.J.E.C. L 74, p. 1. See also "Guidelines for a social action programme," E.C. Bull. Suppl. 4/73.

34. Commission of the European Communities, *A Regional Policy for the Community* (1969); Commission of the European Communities," E.C. Bull. Suppl. 8/73. Proposed regulations for the establishment of a Regional Development Fund and for a list of regions that may benefit from the Fund, 16 O.J.E.C. C 86, p. 7 and 16 O.J.E.C. C. 106 p. 26, have not yet been adopted because of serious disagreement among the member states; see the discussions in the European Parliament on 13 Feb. 1974 and 13 March 1974, 17 O.J.E.C. Annex no. 171, p. 107 and no. 173, p. 80. For a discussion of the need, and evolution of the plans, for a Community regional policy, see van Ginderachter, "La politique régionale de la Communauté, justifications, modalités et propositions," 170 *Rev. du Marché Commun* 468 (1973).

35. Spa SACE c. Ministère des finances de la République Italienne, 17 Dec. 1970, 16 Recueil de la Jurisprudence de la Cour [hereafter "Recueil"] 1213; see also F. Grad c. Finanzamt Traunstein, 6 Oct. 1970, 16 Recueil 825.

36. See e.g. Zuleeg, *Das Recht der Europäischen Gemeinschaften im Innerstaatlichen Bereich* (Kölner Schriften zum Europarecht, Bd. 9, 1969); Pescatore, supra n. 8 at 84-86; Hay, Supremacy of Community Law in National Courts," 16 *Am. J. Comp. L.* 524 (1968); Lagrange, "The Court of Justice as a Factor in European Integration," 15 *Am. J. Comp. L.* 709 (1967).

ing Van Gend and Loos c. Administration Fiscale Neerlandaise[37] with respect to a basic mandate of the Treaty. Since then it has refined its holding[38] and extended it to the secondary Community law,[39] especially in a series of subsequent adjudications.

The national courts have accepted these principles and dispelled doubts voiced on constitutional grounds. Of course, in countries such as Belgium,[40] France[41] and the Netherlands,[42] where the constitutions

37. Case no. 26-62, 5 Feb. 1963, 9 Recueil 1.

38. M. Flaminio Costa c. E.N.E.L., 15 July 1964, in Case no. 6-64, 10 Recueil; Firma Molkerei-Zentrale Westfalen/Lippe c. Hauptzollamt Paderborn, 3 April 1968, in Case no. 28-67, 14 Recueil 211; Firm Gebrüder Lück c. Hauptzollamt Köln-Rheinau, 4 April 1968, in Case no. 34-67, 14 Recueil 359; Spa. Salgoil c. Ministère du Commerce Extérieur de la République Italienne, 19 Dec. 1968, in Case no. 13-68, 14 Recueil 661; W. Wilhelm et al c. Bundeskartellamt, 13 Feb. 1969, in Case no. 14-68, 15 Recueil 1; Carmine Carolongo c. Azienda Agricola Maya, 19 June 1973, in Case no. 77/72 (not yet officially reported); Gebrüder Lorenz c. République Fédérale d'Allemagne, 11 Dec. 1973 in Case no. 122/73 (not yet officially reported); Firma Markmann c. Rép. Federal Allemagne, 11 Dec. 1973, in Case No. 121/73 (not yet officially reported); Firma Nordsee c. Rép. Fédérale D'Allemagne, 11 Dec. 1973, in Case no. 122/73 (not yet officially reported); Firma Fritz Lorey c. Rép Fédérale d'Allemagne, 11 Dec. 1973, in Case no. 141/73 (not yet officially reported).

39. Politi, s.s.s. c. Ministère des finances de la République italienne, 14 Dec. 1971, in Case no. 43-71, 17 Recueil 1039; S.p.a. Marimex c. Ministère de finances de la République italienne, 7 March 1972, in Case no. 84-71, 18 Recueil 89; Ministère public de la République Italienne c. Società agricola industria latte, 21 March 1972, in Case no. 82-71, 18 Recueil 119; Leonesio c. Ministère de l'agriculture et des forêts de la République italienne, 17 May 1972, in Case no. 93-71, 18 Recueil 287; Enterprise Riseria Luigi Geddo c. Ente Nazionale Risi, 12 July 1973, in Case no. 2/73 (not yet officially reported).

40. État Belge, Ministre des Affaires Économiques c. Société Anonyme Fromagerie Franco-Suisse Le Ski', Cour de Cass., 27 May 1971, 158 Pasic. 1971 I, p. 886. For application of EEC-regulations, see also Société Anonyme 'Carrières Du-Four' et autres c. Soc. Anon. en Liquidation Association Générale des Fabricants Belges de Ciment Portland Artificiel, Cour de Cass., 8 June 1964, 154 Pasic. 1967 I, p. 1193; Société de Droit Américain 'Advance Transformer Co.' c. Bara, Epouse Aron, et Cons., Cour de Cass., 24 Dec. 1970, 158 Pasic. 1971 I, p. 392.

41. French Const. art. 55, applied with respect to Community regulations in the case of Guerrini, Cour de Cass. (Ch. crim.) 7 Jan. 1972, Dalloz Jurisprudence [hereafter "D."] 497 (1972); see also case of Quaak, Cour de Cass. (Ch. crim.) 13 June 1972, D. 685 (1972), and case of Aim et Autres, Cour de Cass. (Ch. crim.) 7 Nov. 1973, D. S. 154 (1973); but cf. the decision of the Conseil d'État in Soc. Le Comptoir agricole du Pays basnormand, 5 Nov. 1971, D. 481 (1973), rejecting liability of the French government for application of a Commission regulation claimed to be invalid.

42. Dutch Const. art. 66, invoked for direct applicability of articles of the Treaty of Rome and Community regulation by Hoge Raad, Case of Bosch c. De Geus, 18 May 1962. Ned. Jur. no. 115 (1965), and numerous judgments by lower courts, e.g. Kantong, Amsterdam, Case of Ver. v. Fabrikanten en Importeurs van Verbruiksartikelen c. C.M. Merten, 28 June 1962, Ned. Jur. no. 34 (1963). For a detailed discussion of the Dutch cases see van Houten, Possen and Tromm, "Nederlandse Jurisprudentie betr. de Totstandkoming van een Economische Order," 21 *S.E.W.* 63 and 113 (1973). The decisions of the Representatives of the Governments Assembled in Council as such have no direct applicability with-

expressly or by judicial interpretation accord self-executing treaties superiority over prior and subsequent legislation, the primacy of the self-executing portions of the Treaty of Rome and Community regulations is in harmony with generally applicable principles. In West Germany the Federal Constitutional Court has adopted the doctrine of Community law as a separate and directly applicable legal order with the effect of superseding inconsistent national law on the basis of art. 24 of the Constitution.[43] Community regulations are frequently applied.[44] In Italy the thesis of the supremacy and direct applicability of Community law has been espoused by authors of highest repute on the strength of art. 11 of the Italian constitution.[45] The courts likewise gradually seem to follow suit. To be sure, the Constitutional Court has not yet fully recognized the doctrine,[46] but the Court of Cassation and numerous lower courts have in recent judgment expressed themselves in favor.[47] In the United Kingdom the European Communities Act 1972[48] s. 2 provides expressly that "all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from

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out ratification; Brinkhof N.V. v. Nederlandse Spoorwegen N.V. en Deutsche Bundesbahn, 9 Common Market L. Rep. [hereafter "C.M. L. Rep."] 264 (President of Arrondissementsrechtbank Utrecht, 1969).

43. Case of Firma Lück, 9 June 1971, 31 Entscheidungen des Bundesverfassungsgerichts [hereafter "BVerfGE"] 145; Case of anon. Firms, 18 Oct. 1967, 22 BVerfGE 293.

44. See e.g. Case of S. v. D. AG, Bundesgerichtshof [hereafter "BGH"], 9 April 1970, 54 Entscheidungen des Bundesgerichtshof 145; Bundesverwaltungsgericht [hereafter "BVerwG"] 14 Feb. 1969, 31 Entscheidungen des Bundesverwaltungsgerichts [hereafter "BVerwGE"] 279.

45. See especially Monaco, "Riflessioni sull' adequamento dell' ordinamento italiano al diritto communitario," 13 *Riv. Dir. Eur.* 3 (1973).

46. In the famous case of Costa v. Enel the Italian Constitutional Court held that a subsequent statute could not be challenged as unconstitutional under art. 11 of the Italian Constitution because of an alleged inconsistency with Community law; Decision no. 14, 7 March 1964, 9 Giurisprudenza Costituzionale [hereafter "Giur. Costit."] 129 (1964). The Court intimated, however, that such statute would nevertheless remain fully effective. In the subsequent case of Soc. Acciaierie San Michele v. C.E.C.A., decision no. 98, 27 Dec. 1965, 10 Giur. Costit. 1322 (1965), the Court upheld the constitutionality of the Act of 25 June 1952, giving force of law to the ECSC Treaty. The challenge was based on the jurisdictional provisions of the Treaty, but the Court held them to be consistent with the judicial guarantees of the Italian Constitution because of the separate character of the legal order of the Community.

47. See e.g. the decisions of the Court of Cassation in Min. finanze c. Soc. Isolabella, 8 June 1972, 95 *Foro Italiano* I, p. 1963; Schiavello c. Nesci, 6 Oct. 1972, 95 *Foro Italiano* I, p. 2769; and of the Court of Appeal of Milan in Soc. S.a.f.a. c. Min. finanze, 12 May 1972, 11 Dir. n. Scambi internaz. 279 (1972), 12 C.M. L. Rep. 158 (1973). See Maestripieri, "The Application of Community Law in Italy in 1972," 10 *C.M. L. Rev.* 340 (1973).

48. 1972 c. 68.

time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognized and available in law, and be enforced, allowed and followed accordingly." In consequence of this mandate British Courts have commenced to apply Community regulations and recognized that they prevail over conflicting domestic law.[49]

Since in cases of doubt the interpretation of the Treaty of Rome and the validity and interpretation of Community acts is entrusted to the Court of Justice of the European Communities, the Treaty provides for a procedure whereby the relevant questions are submitted to the Court by the national tribunals.[50] Resort to the Court in Luxembourg is optional for lower courts and tribunals and mandatory for courts whose judgments are not subject to further review under national law. Practically all judicial branches in old member states have resorted to the "preliminary question" procedure provided by art. 177. The French Conseil d'État which for more than a decade found reasons to avoid the mandate of art. 177 finally in 1970 joined the ranks of the other highest courts by submitting a preliminary question to the Court of Justice.[51]

D. A Community Court Exercising Judicial Control over Observance and Uniform Application of Community Law

The Court of Justice of the European Communities plays an important role in the effective working of the integration process. Although its jurisdiction under the three treaties is not identical, the fundamental features are comparable and the respective provisions in the EEC Treaty may be regarded as a prototype. Without going into the details of the rather complex system of jurisdiction,[52] it may be stated that the most important judicial functions are allocated to the Court by four articles of the Treaty: 169, 173, 177 and 178. In the

49. Esso Petroleum Co. Ltd. v. Kingswood Motors, (Addlestone) Ltd., [1974] Q.B. 142.

50. Treaty of Rome art. 177.

51. Syndicat nat. du commerce extérieur, 10 July 1970, Recueil des arrêts du Conseil d'État [hereafter "C.E."] 477 (1970), but cf. Soc. "Le Comptoir agricole du Pays bas-normand', Conseil d'État, 5 Nov. 1971, D. 481 (1973).

52. For a comprehensive treatment of the jurisdiction of and procedure before the Court of Justice, see *Droit des Communautés européennes* (under the direction of Ganshof van der Meersch) 295-405 (1969); for a concise summary see Ipsen, Europäisches Gemeinschaftsrecht 365-74 (1972).

aggregate these provisions have the goal to assure observance and uniform application of Community law.

Art. 169 provides for judicial determination of the question whether or not a member state has failed to perform its obligations under the Treaty of Rome as implemented by secondary Community law. The proceedings are initiated on complaint by the commission, if discussions between the Commission and the respective State have failed to produce agreement. The judgment of the Court is declaratory in nature but imposes on the defaulting State the duty to take the necessary measures (art. 171).[53]

Art. 173 invests the Court with power to annul acts of the Council or the Commission if such acts are illegal by reason of lack of jurisdiction, violation of essential formal requirements, violation of the treaty or rules applicable in execution thereof or abuse of discretion. Proceedings for annulment may be initiated by member states, the Council or the Commission. Private parties likewise have standing to sue for annulment of Community acts, but in that case the attack can be directed only against decisions addressed to the complainant or against regulations or decisions addressed to other parties which despite their form affect the aggrieved party individually and directly. As can be seen from this summary, the Council may bring annulment proceedings against the Commission and vice versa. Indeed, such a litigation has actually occurred.[54]

Art. 177 creates a procedure by which the Court may be asked for determination of questions relating to the interpretation of the Treaty or the validity or interpretation of Community acts when such issues arise in proceedings pending before national tribunals. If these questions arise in national tribunals of last resort, certification to the Court is mandatory.

Finally, art. 178 grants the Court jurisdiction to entertain damage actions against the Community as a legal entity based on torts committed by Community institutions, officials or employees. Such responsibility is imposed upon the Community by art. 215 of the Treaty of Rome.

The grant of extensive judicial functions to the Court of Justice has by no means remained a dead letter. By the end of 1973 the Court

53. Treaty of Rome art. 170 vests the Court with jurisdiction over complaints by one member state based on nonperformance by another member state of obligations imposed by the Treaty. The institution of such action requires previous resort to the Commission.

54. Commission v. Council, 1971, Case no. 22/70, 17 Recueil 263 (1971).

had decided a total of 548 cases involving controversies[55] other than proceedings commenced by staff members because of employment issues[56] and proceedings involving privileges and immunities. Of the 548 cases, 227 concerned the ECSC, 2 Euratom and 319 the EEC. Among these 319 EEC cases, 24 were brought under art. 169, 64 under art. 173, 209 under art. 177 and 22 under art. 215. Hence nearly two-thirds of all cases involving EEC law came to the Court via art. 177.

The Court has discharged its judicial task with a great deal of statesmanship. While it has consistently insisted on observance of the primacy of Community law[57] and approached the scope of Community powers in a liberal and policy-oriented manner, it has been at the same time careful not to interfere with the proper legislative and judicial functions of the member states. Thus in the exercise of the so-called "preliminary question" jurisdiction under art. 177, the Court has repeatedly reiterated that it has only the power to interpret or determine the validity of Community law and has carefully avoided passing on the effect of its holding on the particular controversy pending before the national tribunal[58] or to determine the procedural methods which must be followed in order to arrive at consistency between national and Community law.[59] It has developed and enunci-

55. Cumulative statistics of the Court's work, classified under various aspects, are given in the Commission's annual General Reports on the Activities of the Communities. The data presented in this paper are based on the Seventh General Report (covering calendar year 1973), Tables 15-17.

56. The Court has jurisdiction over controversies between the Communities and their officers and employees; EEC Treaty art. 179. By the end of 1972 the Court had adjudicated 221 cases of this type.

57. See supra s. C. Recently the Court has made it clear that the direct applicability is independent of and in conflict with any transformation through national legislation; see Ditta Fratelli Variola, c. Ammin. delle finanze italianna, 10 Oct. 1973, Case no. 34/73 (not yet published); Commission c. Republique Italienne, 7 Feb. 1973, Case no. 39/72 (not yet published).

58. See e.g. Getreide Import GmbH, Duisburg c. Einfuhr und Vorratsstelle für Getreide und Futtermittel, 12 July 1973, Case no. 11/73 (not yet published). It follows from this restriction to the interpretation and determination of the validity of Community law that the Court may not and will not construe the character of national legislation. See e.g. Capolongo c. Azienda Agricola Maya, 19 June 1973, Case no. 77/72 (not yet published); but see also Riseria Luigi Geddo v. Ente Nazionale Risi, 12 July 1973, Case no. 2/73 (not yet published). Even less will the Court interpret international agreements between member states, although it will extract from an inept question one over which it has jurisdiction: see e.g. Veuve Vandeweghe et al. c. Berufsgenossenschaft für die chemische Industrie, Heidelberg, 27 Nov. 1973, Case no. 130/73 (not yet published).

59. See Gebrüder Lorenz, GmbH v. République Fédérale d'Allemagne, 11 Dec. 1973, Case no. 120/73 (not yet published) and the parallel judgments of the same day, Cases no. 121/73, 122/73, 141/73.

ated general principles of Community law in order to protect the basic civil rights of the Community citizens[60] and to safeguard the autonomy, certainty, fairness and efficiency of Community law.[61]

As a result the Court is held in highest esteem and its decisional law is recognized as a significant moving force in the process of integration.[62]

E. Foreign Relations Powers Over Subjects Governed by Community Policies

Of paramount importance in the success of the integrative process of the European Communities is the attribution of a foreign relations power in fields governed by Community policies. Art. 210 of the EEC Treaty invests the Community with international legal personality and art. 228 regulates the conclusion of international agreements between the EEC and other nations.[63] Art. 113(1) provides expressly that upon the expiration of the transitional period the formation of common commercial policy is vested exclusively in the Community and that this authority includes specifically the conclusion of agreements on tariffs and of trade agreements. Apart from such specific grant of power in the Treaty, however, it was debated for a long time whether the introductory clause of art. 228 ("to the extent that the

60. Stauder c. Ville d'Ulm Sozialamt, 12 Nov. 1969, case no. 29/69, 15 Recueil 419; Internationale Handelsgesellschaft c. Einfuhr und Vorratsstelle fur Gertreide und Futtermittel, 17 Dec. 1970, Case no. 11/70, 16 Recueil 1125, discussed by Ipsen, supra n. 52 at 715-41 (1972).

61. See the discussions by Ipsen, ibid. 733, 734, and by Pescatore, "Le droit de l'homme et l'integration européenne," 1968 *Cahiers de Droit Européen* 629, 1973, Case no. 80/72 (not yet published) (principle of certainty of the law); Muras c. Hauptzollamt Hamburg-Jonas, 9 Oct. 1973, Case no. 12/73 (not yet published) (principle of uniform and autonomous interpretation of Community law); Wilhelm Werhahn Hansamühle et al. c. Conseil et Commission, 13 Nov. 1973, Cases no. 63-69/72 (not yet published) (interest of a good administration of justice); SOPAD c. FORMA et FIRS, 5 Dec. 1973, Case no. 143/73 (not yet published) (principle of immediate applicability of amendments); Gebrüder Lorenz, GmbH c. République Fédérale d'Allemagne, 11 Dec. 1973, Case no. 120/73 (not yet published) (interest of a good administration of justice and exigencies of principle pf certainty of the law).

62. See Schermers, "The Court of Justice as a Promoter of European Integration," infra p. 444; Ipsen, supra n. 52 at 373, 374 (1972); Green, *Political Integration by Jurisprudence, The work of the Court of Justice of the European Communities in European Political Integration* (1969); Buxbaum, "Article 177 of the Rome Treaty as a Federalizing Device," 21 *Stan. L. Rev.* 1041 (1969).

63. See Pescatore, "Los Communautés en tant que personnes de droit internationale," in *Droit des Communautés européennes*, supra n. 52 at 107-20 Ipsen, ibid, 174 (1972); Costonis, "The Treaty-Making Power of the European Economic Community: The Perspective of a Decade," 5 *C.M. L. Rev.* 421 (1968).

Treaty provides for the conclusion of Treaties between the Community and one or more nations") included also matters of Community policy not expressly coupled with treaty-making powers. In a celebrated judgment, rendered in 1971, the Court extended the treaty-making power to subjects in which the Community has the power to establish Community policies, if the Community has exercised this power and the subject involves relations with other nations.[64] Although in many respects the judgment seems to be the reverse of the famous U.S. decision in *Missouri v. Holland*,[65] which gave Congress the power to proceed to the necessary implementation of a treaty, it would be premature to interpret it as an unlimited extension of the Community's foreign relations power to all matters of Community concern.[66]

Although the exclusivity of the Community's power over tariff duties and agreements involving commercial policy dated only from the entry into effect of the Common Community Tariff[67] or the end of the transition period[68] the Community, pursuant to art. 111 participated in GATT tariff negotiations even before that date, especially in the so-called Kennedy Round. Thus the communities signed the Geneva Protocol of 1967 concluding these negotiations, agreed upon a list of Community concessions and formally concluded the respective agreements by Council decision of 27 Nov. 1967[69] in addition to the action of the individual member states. Of course, the new GATT negotiations will be conducted exclusively by the Commission pursuant to policies proposed by the Commission[70] and fixed by the Council upon consultation with European Parliament. The EEC has participated as an observer in recent sessions of the UN Sea Bed Committee and is in the process of developing a Community Policy to be followed

64. Commission c. Conseil, 31 March 1971, Case no. 22/70, 17 Recueil 263.

65. 252 U.S. 416 (1920).

66. Accord, Waelbroeck, "L'arrêt AETR et les compétences externes de la CEE," 1971 *Integration* 79. Regarding the possibility of resort to art. 235 as legal basis for treaty-making, see Peeters, "L'article 235 du Traité C.E.E. et les rélations extérieures de la C.E.E." 164 *Rev. du Marché Commun* 141 (1973). The Commission has asserted exclusive competence to negotiate international agreements within the framework of the Codex Committee on Food & Hygiene (FAO-WHO), Answer to Written Question no. 125/73, 16 O.J.E.C. C 102, p. 4.

67. Council Regulation no. 950/68 of 28 June 1968, O.J.E.C. L 172, p. 1 (1968).

68. 31 Dec. 1969.

69. 11 O.J.E.C. L 305, p. 1. The conclusion was in the form of a decision rather than a regulation, probably to avoid self-executing character.

70. See Commission of the European Communities, "Development of an overall approach to trade in view of the coming multilateral negotiations in GATT," EC Bull. Suppl. 2/73.

at the 1974 Conference on the Law of the Sea. Since by virtue of the Treaty the fisheries policy is within the scope of agricultural policy, the Community would possess exclusive treaty-making power to that extent; beyond this its main function consists in coordination of member state policies.[71] Moreover, in view of the fact that the Council on 19 July 1973 adopted a program of environmental policy,[72] the Commission proposed a Council decision authorizing the Commission "alongside the Member States" to participate in the negotiations for the conclusion of a Convention for the prevention of sea pollution from land-based sources.[73]

The exercise of its treaty-making powers involves baffling legal issues when the negotiations are conducted within the framework of an international organization such as GATT or FAO, whose membership is composed of individual nations. Since the Communities are not states within the purview of international law, their participation in the proceedings of such organizations requires some adjustment of their internal procedures.[74]

F. Supplement Power to Assure Achievement of Community Goals

As in any government of enumerated powers, it is desirable that the basic charter provide a method by which achievement of the essential aims of the organization can be assured despite technical shortcomings in the instrumentarium of powers granted to it. In the Treaty establishing the EEC, art. 235 performs the function of this gap-filling mechanism. It empowers the Council by unanimous vote to enact measures necessary for the achievement of Community goals when the Treaty fails to provide for the requisite authority.

During the course of its development, the Community has been compelled to resort more and more to this power reservoir. During

71. See Answers to Oral Questions no. 59/73 and 126/73, O.J.E.C. Annex no. 164, p. 12, and Annex no. 168, p. 32 (1973), and to Written Question no. 240/73, 16 O.J.E.C. C. 78, p. 38.

72. See EC Bull. no. 7/8, 1301-09 and 2224 (1973).

73. 16 O.J.E.C. C. 114, p. 32 (1973)

74. The legal aspects of participation by the European Communities in the work of various UN bodies was the object of a report (Doc. 57/73) of the Legal Affairs Committee of the European Parliament. It was debated at the Session of 6 July 1973, O.J.E.C. Annex no. 164, p. 244 (1973). Parliament thereupon passed a resolution, calling for placing Community participation on a legal, appropriate and regular basis by means of arrangements concluded between the Communities and the UN or the Specialized Agencies; 16 O.J.E.C. C. p. 48-50 (1973).

the transitional period when the Community's actions were mainly focused on the perfection of the Customs Union and the creation of the common organization of the agricultural markets, art. 235 was only sparingly utilized. In recent years, however, when the Community embarked on the establishment of a regional social and environmental policy, art. 235 has become a principal basis for actions in these areas on the Community level.

One of the principal early instances of reliance on art. 235 was the institution of trading systems for commodities manufactured from agricultural products at a processing stage not covered by Annex II. Thus Regulation no.160/66,[75] determining the system of trade applicable to certain goods processed from agricultural products, was based on art. 235 since it introduced a system of levies on imports and refunds for exports of goods which were not covered by Annex II, but were manufactured from agricultural materials subject to art. 38-46.[76] Similarly, the introduction of an analogous trading system for ovalbumin and lactalbumin by Regulation no. 48/67[77] was based on art. 235 since ovalbumin was not included in the list of agricultural products in Annex II. Because of the transition of the existing common market organizations to the single market stage and of changes in the Community financing of refunds for exports, the trading systems for goods processed from agricultural products but not covered by Annex II was subsequently extensively revised. The system of import levies on such products was recodified by Regulation no. 105/69[78] (taking the place of Regulation no. 160/66) and 170/67[79] (taking the place of Regulation no. 46/67), both of which were again based on art. 235, while the provisions for refunds were included in the basic regulations governing various product sectors but reconsolidated for products not covered by Annex II in Regulation no. 204/69[80] and subsequently by Regulation no. 2682/72,[81] both of which no longer rested on art. 235. In a recent case[82] the question was raised whether

75. 27 Oct. 1966, 9 O.J.E.C. p. 3361.

76. The system of trade consisting of import levies and refunds for exports replaced a prior system of compensatory levies on imports of such goods established by Council Decision of 4 April 1962, 5 O.J.E.C. p. 999, which likewise rested on art. 235.

77. 7 March 1967, 9 O.J.E.C. p.646.

78. 28 May 1969, 12 O.J.E.C. L. 141, p. 1.

79. 27 June 1967, 10 O.J.E.C. p. 2596.

80. 28 Jan. 1969, 12 O.J.E.C. L. 29, p. 1.

81. 12 Dec. 1972, 15 O.J.E.C. L. 289, p. 13.

82. Hollandse Melksuikerfabriek v. Hoofdproduktschap voor Akkerbouwprodukten, 13 Dec. 1973, Case no. 150/73 (not yet published). The Court intimated that lactalbumin

failure to recite art. 235 as basis for the enactment of Regulation no. 204/69 rendered it invalid. The Court of Justice, however, did not pass expressly on that question, since it arose in a controversy involving a claim for a refund for exports of lactalbumin for which the Commission had not provided such refunds for exports.

Other examples of resort to art. 235 are furnished by Regulation no. 802/68[83] (establishing rules governing the origin of goods) and no. 803/68[84] (establishing rules for the determination of the customs value of goods). Portions of the first regulation and all of the latter were not covered by specific authorizations in the treaty. Regulation no. 803/68 was upheld as properly based on art. 235 by the Court in a judgment of 12 July 1973.[85]

The transformation of the Community into a Monetary and Economic Union and its responsibility for the development of Community action in the fields of monetary, social and regional policy[86] will entail a more frequent resort to art. 235. Thus Regulation no. 907/73 of the Council, establishing the European Fund for Monetary Cooperation,[87] or the regulations governing the unit of account and the exchange rates to be applied for the purposes of the common agricultural policy,[88] invoke art. 235 either alone or with other provisions as their legal base. Likewise the creation of the financial apparatus necessary to discharge the Community's responsibility in the execution of the regional policy[89] as well as the legal framework of its actions in the field of environmental policy[90] will have to be based on art. 235.

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likewise was a product not covered by Annex II (ground no. 4), which seems to be inconsistent with the view of the other institutions.

83. 27 June 1968, 11 O.J.E.C. L. 148, p. 1.

84. 27 June 1968, 11 O.J.E.C. L. 148, p. 6.

85. Hauptzollamt Bremerhaven c. Soc. Massey-Ferguson, Case no. 8/73 (not yet published).

86. Pursuant to the decisions of the Heads of State at the Summit Conference at Paris on 19 and 20 Oct. 1972; see text of the Declaration adopted, 5 E.C. Bull. no. 10, p. 14-23 (1972). The Council adopted a resolution concerning a social action program based on art. 235 on 21 Jan. 1974, 17 O.J.E.C. C. 13, p. 1.

87. 3 April 1973, 16 O.J.E.C. L. 89, p. 2.

88. Regulation no. 2543/73, 19 Sept. 1973, 16 O.J.E.C. L. 263 p. 1 and Regulation no. 653/68, 30 May 1968, 11 O.J.E.C. L. 123, p. 4; see also Regulation no. 3450/73, amending Regulation no. 974/71, 17 Dec. 1973, 16 O.J.E.C. L. 353 p. 25.

89. See the proposed regulation for the creation of a European Regional Development Fund, 16 O.J.E.C. C. 86, p. 7 and the Report on the regional problems of the enlarged Community, E.C. Bull. Suppl. 8/73. Cf. the references in n. 34, supra.

90. See the report by Mr. Jahn on the Community environmental action programme in Debates of the European Parliament, 16 O.J.E.C. Annex 164, p. 57; the resolution of the European Parliament, 16 O.J.E.C. C. 62, p. 16; the reply of the Commission to Written

III. The Legal Framework of Regional Integration in Latin America

A. *The Latin American Free Trade Area*

The Treaty Establishing a Free Trade Area and Instituting the Latin American Free Trade Association[91] was signed on 18 Feb. 1960, at the Intergovernmental Conference for the Establishment of a Free Trade Area Among Latin American Countries held at Montevideo in 1959 and 1960. It went into effect on 1 June 1961. There were seven original member countries: Argentina, Brazil, Chile, Mexico, Paraguay, Peru and Uruguay. Columbia, Ecuador, Venezuela and Bolivia joined subsequently, extending the free trade area to eleven nations. The genesis of the Treaty of Montevideo reflects the impetus to the idea of regional integration imparted by the signing of the Treaty of Rome in 1957.[92] At the outset, however, the working group, invited by ECLA to work out the basic structure which the common market should assume, decided not to start with the immediate creation of a customs union and automatic removal of all interzonal trade barriers.[93] Instead it recommended to initiate the integrative process with the establishment of a free trade area designed to be transformed gradually into a customs union suitable to the needs of Latin America. While the final objective of the common market was the elimination of all duties and restrictions between Latin American countries, this goal was to be achieved in two stages and by methods possessing great flexibility. During an initial stage of ten years the intrazonal customs duties were to be reduced to the lowest feasible average level (varying for three basic categories), accompanied by elimination of other restrictions. The desirable reduction was to be accomplished by means of periodic negotiations carried out by a Committee on Trade Policies and Payments composed of representatives of all member countries. The reductions and abolitions made were irrevocable, except in enu-

Question no. 60/73, 16 O.J.E.C. C. 89, p. 5, and the "Programme of environmental action of the European Communities," E.C. Bull. Suppl. 3/73.

91. For an English translation of the Treaty of Montevideo, see *Instruments*, supra n. 2 at 207 (1968).

92. For the proposals and negotiations leading to the conclusion of the Treaty of Montevideo, see Wionczek, "A History of the Montevideo Treaty," in Wionczek, ed., *Latin American Economic Integration, Experiences and Prospects* 67 (1966). The preparatory work was collected and published by the U.N. as Doc. E/CN 12/531 under the title *The Latin American Common Market* (1959).

93. *Recommendations concerning the structure and basic principles of the Latin American common market*, Report of the second session of the Working Group (Mexico City, 16-27 1959), E/CN 12/531, ibid. 38-50.

merated cases. A special system was to be provided for the less developed member countries. The recommendations of the Working Group were rejected in the conclusions of a meeting of consultants from the five southern nations which was convened by the ECLA secretariat soon thereafter during April 1959 in Santiago.[94] These consultations resulted in the actual draft of a free trade area agreement which contained most of the features subsequently found in the Treaty of Montevideo.[95]

The Treaty of Montevideo as actually negotiated adopted the basic approach developed in the preceding discussions. It established a free trade area which was to become fully operative within 12 years, i.e. on 1 June 1973.[96] On that date the contracting parties were to initiate negotiations with a view to convert the trade area into a new stage of economic integration.[97] The attainment of the final free trade area stage was not to be reached by automatic across-the-board tariff reductions and mandatory removal or restrictions pursuant to decisions by a supranational body; rather the Treaty created a GATT-type arrangement, relying on a set of targets and negotiation rounds to meet them.

The details of the liberalization program are set forth in art. 2-13 of the Treaty. Continuous progress in the completion of the free trade area was to be achieved by periodic negotiations, the results of which were to be embodied in a set of national schedules and a common schedule.[98] The national schedules specify the annual reductions in duties, charges and other restrictions granted by each member country to the other member countries. The annual reductions shall be not less than 8% of the weighted average applicable to imports from third countries, the details of the reduction mechanism being set forth in Protocol no. 1 to the Treaty.[99] Concessions appearing only on the national schedules may be withdrawn by the grantor on the basis of adequate compensation in a fashion similar to that existing under GATT.[100] Inclusion of a product in the Common Schedule, however,

94. E/CN 12/531, ibid. 93-108.

95. Ibid. 102. For the last phases of negotiations at the Montevideo conference, see Mageriños de Mello, "La Asociación Latinoamericana de Libre Comercio, Esperanzas, frustraciones y perspectivas de la integración ibero-americana, 14 *Derecho de la Integración* 11, 25 (1973).

96. Treaty of Montevideo art. 2.

97. Ibid. art. 61.

98. Ibid. art. 4.

99. Ibid. art. 5, 6, and 9 and Protocol no. 1.

100. Ibid. art. 8, para. 2.

produces important changes in its status. Listing a product on the Common Schedule has a two-fold effect: it will be automatically freed from all intrazonal duties and restrictions at the end of the initial twelve-year period, and the concessions granted for it in the national schedules become irrevocable.[101] The Common Schedule is to cover substantially all of the existing trade among member countries[102] as a result of four rounds of negotiations to be held in three-year intervals. At the end of the first three-year period the products on the Common Schedule were to constitute 25% of the intrazonal trade in terms of value, to be increased to 50% and 75% at the end of the following three-year intervals.[103]

In addition to the provisions governing the general trade liberalization program, the Treaty provided for a system of special concessions to less developed member countries which are not extended to the other contracting parties,[104] established special rules governing agriculture,[105] and provided for a program of "industrial complementation", to be effectuated in suitable cases by means of accords concluded either by member countries or by the representatives of the industry sectors concerned.[106] In the latter respect the LAFTA Treaty went considerably beyond merely establishing a trade liberalization system.[107]

On the institutional side the Treaty of Montevideo was particularly weak. Although later developments strengthened and enlarged the institutional arrangements, the basic shortcomings of the system persisted.[108] The Supreme governmental body of the Free Trade Area Association is the Conference of the Contracting Parties, which holds

101. Ibid. art. 4b and 8, as interpreted by Resolution 70 (1963) of the Conference of the Contracting Parties.

102. Ibid. art. 3 and 7. The Treaty of Montevideo contains no provisions for new intra-area trade originating after the end of the 12 year period; see answer to Question 130, directed by the GATT members to the LAFTA parties in 1960, reprinted in Instruments, supra n. 2 at 245, 249.

103. Treaty of Montevideo, ibid. art. 7.

104. Ibid. art. 32.

105. Ibid. art. 27-31.

106. Ibid. art. 16, 17.

107. See Garcia Reynoso, "Problems of Regional Industrialization," in Wionczek, supra n. 92 at 152-69 (1966).

108. For a detailed analysis of the institutional arrangements of LAFTA, see *Derecho de la Integracion Latinoamericano* (García Amador, Orrego Vicuna, and Tolosa in cooperation with numerous others under the auspices of the Interamerican Institute of International Legal Studies, ch. 9 (1969); Magariños de Mello, supra n. 95 at 26-34); see also Milenky, *The Politics of Regional Organization in Latin America: The Latin American Free Trade Association* 27-35 (1973); Orega Vicuña, "Balance crítico de los aspectos juridicos e

annual regular sessions and special sessions as needed.[109] Its functions are specified in art. 34 and include the adoption of measures necessary to carry out the mandates of the treaty and the promotion of tariff negotiations prescribed by art. 4. In addition to the Conference, the Treaty established only one other organ, called the Standing Executive Committee,[110] composed of one permanent representative for each member country and subordinate to the Conference. One of the Committee's main functions is the drafting of recommendations for the effective implementation of the Treaty. It is assisted by a secretariat under the direction of the Executive Secretary.[111] In addition to these two organs, a protocol amending the Treaty, signed on 12 Dec. 1966, created a Council of Ministers of Foreign Affairs of LAFTA and elevated it to the rank of supreme organ.[112] The protocol needs ratification by all parties;[113] until then the Council of Ministers of Foreign Affairs acts as part of the Conference of the Contracting Parties.[114]

The organs of the Latin American Free Trade Area Association are empowered to enact resolutions which constitute so-called secondary Association law.[115] They establish obligations for the member countries, but their status as part of the national legal orders presents difficult questions.[116] This applies particularly with respect to acts comprising the results of tariff negotiations. Despite the Treaty's mandate that they shall enter into force on the first day of January following the adoption of the Act of Negotiation, the governments[117] put them into force only after enactment of the necessary regulations.

The weakness of the functional and institutional framework of the Treaty of Montevideo became especially manifest in 1967, when the member countries were unable to agree upon the second installment of the Common Schedule during the seventh regular session of

institucionales de la ALALC," 5 *Anales de la Facultad de Ciencias Jurídicas y Sociales* no. 5 (Univ. de Chile 1967).

109. Treaty of Montevideo art. 33 and 36.

110. Ibid. art. 33, 39.

111. Ibid. art 41.

112. For the text see *Instruments*, supra n. 2 at 318.

113. The protocol was signed on the date given in the text by all countries except Chile, which did so only on 12 April 1967. It is, however, not yet ratified by all countries. Lacking are the ratifications of Chile, Uruguay and Venezuela.

114. Resolution 117(V), *Instruments*, supra n. 2 at 317.

115. See the discussion in *Derecho de la Integracion Latinoamericana*, supra n. 108 at 1029-1104.

116. Ibid. 1081-99.

117. Ibid. 1055-59, 1090, 1091.

the Conference as prescribed by the Treaty.[118] Resolution 221(VII) charged the Standing Executive Committee with calling a special session of the Conference for that purpose in 1968,[119] but that session also had to adjourn without result.[120] The Standing Executive Committee received the mandate to study the avenues for belated compliance with the mandates of the Treaty, a charge which was repeated by Resolution no. 239 (VIII).[121] This status of the Common Schedule thus became part of the work aiming at a total revision of the Treaty of Montevideo which was undertaken during 1969. On 12 Dec. 1969 the ninth regular session of the Conference adopted two resolutions which proposed an amendment of the Treaty of Montevideo (Resolution 261 (IX))[122] and established an action plan for the decade 1970-1980 (Resolution 262 (IX)).[123]

The proposed amendment, designated the Caracas Protocol, extends the transitional period until 31 Dec. 1980, suspends the provisions governing the common schedule until 31 Dec. 1974,[124] and imposed on the Standing Executive Committee the duty of submitting, prior to 31 Dec. 1973, a report on the creation of a Latin American Common Market as envisaged by art. 54 of the Treaty, in order furnish [sic] a basis for negotiations to commence in 1974. The annual negotiations for reductions of the intrazonal tariffs were to continue, subject to new target figures.

Despite the urgency of the matter, four countries (Chile, Peru, Columbia and Uruguay) had failed to ratify the protocol prior to the termination of the twelfth regular session of the Conference in December 1972. As a result, the Conference adopted four resolutions dealing with the matter.[125] The first directed the President to alert the

118. The functional and institutional weakness of the legal framework of the Treaty of Montevideo, especially of its system of liberalization by negotiations, has been commented upon by a number of recent authoritative writers; see especially Magariños de Mello, supra n. 95 at 55 et seq.; Magariños G., "La ALALC: La experiencia de una evolución de once años, 12 *Revista de la Integración* 91 (1973); Ruocco, "La problemática de la negociaciones comerciales en la ALALC," 11 *Revista de la Integración* 33 (1972).

119. ALAC, *Síntesis Mensual* 24 (1968).

120. See the Final Act of 15 Nov. 1968, ALALC, *Síntesis Mensual* 512 (1968).

121. ALALC, *Síntesis Mensual* 18, 21-23 (1969).

122. Ibid. 506.

123. Ibid. 509.

124. See Resolution 261 (IX), art. 4, 5, and 7. Art 5 provides that until the adoption of the new regime, to be established pursuant to art. 4, no compliance with the dates and percentages prescribed in art. 7 is required. Art. 7 liberates the products included in the first installment of the common schedule.

125. Resolutions 304 (XII), 305 (XII), 306 (XII), and 307 (XII); ALALC, *Síntesis Mensual* Supp. 2 (Jan. 1973).

countries remiss in ratifying to the difficulties which would result from their failure to take timely action. The second established that the provisions of the Treaty governing the completion of the free trade area would remain in force until 31 Dec. 1973, if the Protocol was not ratified by all countries prior to that date. A third resolution provided for calling a special session, if necessary, to consider the matter of ratification. The third resolution extended the authority to grant special concessions to the four less developed member countries until revision of the Treaty in case the Protocol failed to enter into force. Subsequently, the missing four countries proceeded to ratification, Uruguay completing the process just four days before the final deadline.[126]

Certainly the development of the Latin American Free Trade Area shows that the lack of a more effective framework for integration has contributed to its stagnancy and that a remedy of this defect is needed.[127]

B. The Andean Subregional Common Market

Because of their dissatisfaction with the slow progress and imbalance of Latin American integration, a group of countries decided to accelerate the process by establishing a common market among themselves. The necessary step was taken by means of the so-called Agreement of Cartagena which set up the Andean Common Market in 1969. This event was the culmination of efforts[128] which were initiated with the Declaration of Bogota, issued on 16 Aug. 1966[129] by the Presidents of Chile, Columbia and Venezuela and the personal representatives of the Presidents of Ecuador and Peru. The Declaration urged a reform of the structure of the Latin American Free Trade Association and within the framework of the Treaty of Montevideo the conclusion of arrangements permitting the less developed LAFTA countries to integrate their economies. Further impetus to the scheme was given by the Declaration of the Presidents of America issued in Punta del Este of 14 April 1967,[130] which charged the LAFTA Council of Ministers of

126. ALALC, *Síntesis Mensual* no. 92, p. 41 (Chile), no. 94, p. 14 (Peru) and no. 99, p. 23 (Colombia) (1973); 9 *Boletín de la Integración* 71 (Colombia and Uruguay) (1974).

127. See Prebisch, *Change and Development: Latin America's Great Task* (Report submitted to the Inter-American Development Bank) 164-70 (1970).

128. For a detailed account of the genesis of the Cartagena Agreement, see *Derecho de la Integración Latinoamericana*, supra n. 108 at 352-77 (1969).

129. For the text (in Spanish) see Acuerdo de Integración Subregional Andinog (Fondo del Libro, Banco Industrial del Peru) 59 (1969).

130. For the text (in English) see *Instruments*, supra n. 2 at 395 (1968).

Foreign Affairs with the adoption of measures facilitating the conclusion of subregional arrangements. In compliance with this task the Council of Ministers of Foreign Affairs adopted Resolution no. 202,[131] requesting the LAFTA Conference to adopt norms for subregional agreements according to specified guidelines; the Conference did so in Resolution no. 222 (VII).[132] At the same time the Council of Ministers approved the bases of a subregional agreement submitted by Columbia, Chile, Ecuador, Peru and Venezuela as compatible with the principles of Resolution no. 202.[133] The actual draft of the subregional agreement was prepared by the Mixed Commission established by the Declaration of Bogota and a committee of experts appointed for that purpose. The trial draft was approved by the Mixed Commission during its sixth meeting in Cartagena in May 1969 and signed at Bogota by the representatives of Bolivia, Columbia, Chile, Ecuador, and Peru on 26 May 1969.[134] It was submitted to the Standing Executive Committee of LAFTA on 10 June 1969 and approved as compatible with the Treaty of Montevideo and Resolutions no. 202, 203, and 222 by Committee Resolution no. 179.[135]

Venezuela did not adhere to the original agreement but joined the Andean Common Market on 13 Feb. 1973, after completion of the condition provided in art. 109 of the Agreement.[136] The governing instruments and stipulations were found to be compatible with the LAFTA provisions in Resolutions no. 292 and 293 of the Standing Executive Committee.[137] The Venezuelan legislature authorized the necessary ratification in September 1973.[138]

The Agreement of Cartagena[139] establishes a much more closely-knit framework of integration than that created by the LAFTA Treaty. It provides for the gradual establishment of a common market

131. ALALC, *Sintesis Mensual* 507 (1967).

132. ALALC, *Sintesis Mensual* 24 (1968).

133. Resolution 203 (CM-II/VI-E), ALALC, *Sintesis Mensual* 509 (1967).

134. For the text (in Spanish) see ALALC, *Sintesis Mensual* 283 (1969). An English translation is in Int'l Legal Materials.

135. ALALC, *Sintesis Mensual* 277 (1969).

136. The entry required an approval of the conditions of entry given in the form of Decision no. 70 of the Commission of the Cartagena Agreement and an instrument supplementary to the Agreement of Cartagena; for the text see ALALC, *Sintesis Mensual* no. 93, p. 25-39 (1973); 13 *Derecho de la Integracion* 129-35 (1973).

137. ALALC, *Sintesis Mensual* no. 94, p. 23, 24 (1973).

138. 8 *Boletin de la Integración* 721 (1973).

139. The official designation of the instrument as Agreement of Cartagena was established by Decision no. 1 of the Commission, at its first session in Nov. 1969; ALALC, *Sintesis Mensual* 253 (1970).

protected by a common tariff. The common market and its common tariff remain, however, part of the Latin American Free Trade Area and subject to the intrazonal customs commitments.[140] The Agreement places a great number of policies under subregional jurisdiction as enumerated in art. 3, among them coordination of economic and social policies, accompanied by unification of the respective domestic law,[141] greater acceleration of trade liberalization in comparison with that governed by LAFTA,[142] and the establishment of a common tariff, attained by progressive stages by means of a minimum common external tariff.[143]

At the institutional level the Agreement establishes two principal organs: the Commission and the Board.[144] The Commission, composed of one representative from each member country, is the supreme organ of the Agreement. It acts by means of decisions to be taken in three regular annual sessions and special sessions when needed.[145] The Board is the chief technical organ of the subregion. It acts as permanent organ, supervises the execution of the Agreement and is charged with the promotion, by way of planning and making proposals, for the progress of integration.[146] At present the Agreement does not provide for a court but the Commission is vested with dispute-settling functions.[147]

Without discussing in detail the operation and nature of the legal system of the Cartagena Agreement, which has been the subject of a quickly expanding literature,[148] some of its salient features and devel-

140. Cartagena Agreement art. 66(c), 68 para. 2, 114.
141. Ibid. art. 3(a) and Ch. III.
142. Ibid. art. 3(c) and Ch. V.
143. Ibid. art. 3(d) and Ch. VI.
144. Ibid. art. 5.
145. Ibid. art. 6.
146. Ibid. art. 13, 15(a) and 18(c).
147. Ibid. art. 23. The creation of a Subregional Court of Justice is, however, considered necessary and a proposal to that effect has been worked out by the Board, 13 *Derecho de la Integracion* 135 (1973).
148. See e.g. Avery and Cochrane, "Subregional Integration in Latin America: *The Andean Common Market*," 11 *J. Common Market Stud.* 85 (1972); Villagran Kramer, "Sistematización de la estructura juridica del Acuerdo de Cartagena," 12 *Derecho de la Integracion* 11 (1973); Kovar, "Le groupe Andin: Une experience d'integration économique entre etats en voie de développement," *Miscellanea Ganshof van der Meersch* vol. 2, p. 203 (1972); Larrea Holguin, "Régimen de tratamiento a los capitales extrajeros," in *Festschrift für W. Wengler* vol. 1, p. 231 (1973); Rideau, "La Cour Suprême de Colombie et l'integration économique latino-américaine dans le Groupe Andin," *Rev. Int. Dr. Comp.* 331 (1973); Orrego Vicuña, "La incorporación del ordenamiento sub-regional al derecho interno. Análisis de la práctica y jurisprudencia de Colombia," 11 *Derecho de la Integracion* 39 (1972); Orrego Vicuña, "Contemporary International Law in the Economic Inte-

opments should be underscored from the perspective of the legal components of the integration process.

First it must be noted that the Cartagena Agreement establishes an automatic and irrevocable system for intra-subregional trade liberalization which will be completed on 31 Dec. 1980.[149] Because the subregional integration joins developing and least developed countries, the program is not uniform but differentiated as to products and countries, establishing special rules for the benefit of Bolivia and Ecuador.[150] For the purpose of establishing differentiated regimes the products are divided into four, partially overlapping, categories: a) goods subject to sectorial program of industrial development, b) goods included in the first installment of the LAFTA common schedule, c) goods not produced in any of the countries of the subregion, and d) goods not comprised in any of the categories a) to c). The Agreement provides different liberalization schedules for products according to which categories or subcategories they belong.

The general or residual program which applies to all goods not covered by special systems is governed by art. 52 of the Agreement and Decisions no. 15, 27 and 38 of the Commission.[151] According to these rules the intra-subregional tariffs were reduced to the so-called "starting level" which went into force on 31 Dec. 1970, said level being fixed as the minimum charge for the respective product established in the national schedules (under LAFTA) or the customs tariffs of Colombia, Chile and Peru. Thereafter zero tariff was to be reached by automatic annual reductions of 10%. Special systems were established for products on the common schedule (under LAFTA) which were reduced to zero-tariff 180 days after the agreement went into force,[152] goods covered by sectorial program of industrial develop-

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gration of Latin America," Academie de droit international de la Haye, *Colloquium 1971*, p. 102-85 and particularly the Report of the Board on the establishment of an adjudicatory organ of the Cartagena Agreement, supra n. 146. For a more extensive bibliography of the Andean Common Market see 28 *Record of N.Y.C.B.A.* 790 (1973).

149. Cartagena Agreement art. 45.

150. Ibid. art. 46 para. 2, art. 50 para. 2 and 3, 96-102.

151. The earlier decisions of the Commission, without their annexes, are published in ALALC, *Síntesis Mensual*. The pertinent issues are 1970 *Síntesis Mensual* 248-301 (Decisions 1-12), 1971 *Síntesis Mensual* 117-62 (Decisions 13-36), 406-15 (Decisions 37, 17a, 38, 39) 1972 *Síntesis Mensual* 13-46 (Decisions 40-49), 253-58 (Decisions 50-51), 478-82 (Decisions 56 and 57). The decisions of the Commission and resolutions of the Board are also published as part of the official information journal of the Board, *Grupo Andino* (1971-), esp. the Separata.

152. Cartagena Agreement art. 49.

ment (as provided in the respective programs)[153] and goods not produced in the subregion.[154] Tariffs for such goods were reduced to zero level after 28 Feb. 1971, with the qualification , however, that the "liberation" of those goods, if reserved for future production in Bolivia and Ecuador,[155] should benefit exclusively such country. In addition , art. 97(b) of the Agreement provides for accelerated liberation of selected goods produced in Bolivia and Ecuador on 1 Jan. 1971, if the Commission so decides, a power exercised by means of Decision no. 29. Unless otherwise provided as indicated above, all restraints were to be removed on 31 Dec. 1970.[156]

The dismantling of the intrazonal trade barrier is to be harmonized with the establishment of the common sub-regional tariff.[157] The Agreement provided a two-phase approach: a Minimum Common External Tariff to become fully operative by 31 Dec. 1975,[158] and the Common external Tariff, to become fully operative by 31 Dec. 1980. The progress from the Minimum Common External Tariff was to commence on 31 Dec. 1976, Common External Tariff to be approved by the Commission prior to 31 Dec. 1975.[159] The minimum External Tariff was to be and actually was established prior to 31 December 1970.[160] The member countries whose customs duties on imports from outside the subregion were, on the day of the signing of the Agreement, lower than those specified in the Minimum External Tariff are obliged to increase the same by means of annual, lineal and automatic steps until the level of the Minimum External Tariff is reached on 31 Dec. 1971.[161] Conversely member countries which on the date of the Agreement had higher rates, are prohibited from lowering them below the common minimum rate. The subregional common minimum tariff, however, may not effect concessions granted to other LAFTA members pursuant to the Treaty of Montevideo.[162]

One of the most important provisions in the Agreement is art. 27 which directs the Commission, prior to 31 Dec. 1970, to approve and submit to the member countries for adoption a common system gov-

153. Ibid. art. 47, Decision no. 25.
154. Ibid. art. 50, Decision no. 26.
155. Ibid. Decision no. 28.
156. Ibid. art. 46.
157. Ibid. art. 61-68.
158. Ibid. art. 64.
159. Ibid. art. 62.
160. Ibid. art. 63, Decision no. 30, 33.
161. Ibid. art. 64, Decision no. 30, 49 c.1.
162. Ibid. art. 68 and 114, Decision no. 30, art. 10.

erning the treatment of foreign capital as well as trademarks, patents, licenses and royalties. Pursuant to this mandate, the Commission issued the much debated[163] Decision no. 24 (as amended by Decisions no. 37, 37a and 70) whose phasing-out rules and other restrictions on foreign investment are an effort to reconcile the need for foreign capital with the subregional interest in economic self-determination.

Other important provisions aiming at integration of economic and development policies including transport policies, that have been the bases of comprehensive decisions, are art. 28 directing the Commission to approve and recommend to the member countries a uniform system governing multinational enterprises (implemented by Decision no 46),[164] art. 33 on sectorial programs of industrial development (implemented by Decisions no. 18 and 57),[165] art. 75 requiring the adoption of rules necessary for the suppression of practices likely to distort competition within the subregion (implemented by Decision no. 45), and art. 86-88 on physical integration (implemented by Decision no. 56).[166]

In view of the breadth and economic impact of the integrative scheme of the Agreement of Cartagena, it is no surprise that the legal effects of the Agreement itself as well as of the implementing decisions have been the subject of debate and litigation.[167] The issues con-

163. See especially Furnish, "The Andean Common Market's Common Regime for Foreign Investments," 5 *Vand. J. Transnat'l L.* 313 (1972), translated under title "El Régimen Común del Grupo Andino para las inversiones extranjeras," 14 *Derecho de la Integración* 85 (1973); Saavedra, "Acuerdo de Cartagena: Inversiones extranjeras," 14 *Derecho de la Integración* 261 (1973); Larrea Holguin, supra n. 145; Oliver, "The Andean Foreign Investment Code: A New Phase in the Quest for Normative Order as to Direct Foreign Investment," 66 *Am. J. Int'l L.* 763 (1972).

164. See the discussion by Fernandez Saavedra, "El régimen uniforme de la empresa multinacional en el Grupo Andino," 11 *Derecho de la Integración* 11 (1972) and the OAS study on multinational enterprises, 14 *Derecho de la Integración* 243 (1973).

165. Decision no. 18 of 17 July 1970 on programmation of the petrochemical industry; Decision no. 57 of 20 Aug. 1972 on the institution of a sectorial program of industrial development in the mechanical metal industry, 12 *Derecho de la Integración* 187 (1973), discussed by Guerrero, "La programación conjunta del desarrollo industrial subregional y el primer programa sectorial de la industria metal-mecanica," 12 *Derecho de la Integración* 35.

166. For the text see 12 *Derecho de la Integracion* 197 (1973); see also Cipolatti, "Comentarios sobre el transporte internacional por carretera en América del Sur," 14 *Derecho de la Integración* 105 (1973).

167. The most authoritative study of the relevant issues is the memorandum of the Board of the Andean Pact on the establishment of a judicial organ for the Agreement powers, presented to the Commission on 11 Dec. 1972, published in 18 *Derecho de la Integración* 135 (1973). The memorandum relies heavily on Villagrán Kramer, supra n. 145 at 11 et seq. The question of the constitutionality was also the subject of a Round Table sponsored by the Institute of International Legal Studies, held in Bogotá in 1967: "Mesa

cerned the proper method a) for the approval by member countries of the Cartagena Agreement itself, and b) for putting into effect in the national legal systems the decision establishing uniform laws governing matters of subregional interest. The first issue came before both the Council of State and the Supreme Court of Colombia. It involved the question whether the law authorizing the ratification of the Treaty of Montevideo and delegating powers to the executive for the enactment of the necessary measures to implement execution of the LAFTA Treaty,[168] covered the approval by executive decree[169] of the conclusion of the Agreement of Cartagena, which in its art. 110 required ratification by a prospective member country "in conformity with its respective legislative procedures." Decree no. 1245 approving the Cartagena Agreement was attacked as unconstitutional on the ground that the Andean pact was a new and separate treaty requiring legislative approval. The Council of State, by Decision of 2 March 1972,[170] dismissed the complaint for lack of jurisdiction since acts approving international agreements are not subject to judicial review. The Supreme Court of Colombia, in a decision of 26 July 1971,[171] likewise held that Decree no. 1245, to the extent that it approved the agreement, was not open to constitutional attack; but it declared unconstitutional those portions of the decree which entrusted the Colombian Institute of Foreign Commerce with powers to implement the execution of the Agreement. The majority intimated that legislative authorization for the ratification would have been necessary. The issue of the proper method of putting the decisions of the Commission into effect arose with reference to Decision no. 24 which created a uniform system governing foreign investment. The Supreme Court of Colombia, on 20 January 1972,[172] held that Decree no. 1299 of 1971 by which the President had decreed the entry into force of Decision no. 24 was unconstitutional, because its enactment could not be based on Law 88 of 1961, authorizing the ratification of the LAFTA Treaty. A

Redonda sobre La Integración de América Latina y la Cuestión Constitutional (1968)," summarized in *Derecho de la Integración Latinoamericana* III-1149 (1969). See also Rideau, supra n. 148.

168. Colombia, Law 88 of 2 May 1961. For a list of the laws or decrees approving the Treaty of Montevideo, see *Instruments*, supra n. 2 at 443.

169. Colombia, Decree no. 1245 of 8 Aug. 1969. For a list of the decrees of the other original members of the Andean Group, see 14 *Derecho de la Integración* 137 (1973).

170. Reprinted in 10 *Derecho de la Integración* 155 (1973).

171. Reprinted ibid. at 160.

172. Reprinted ibid. at 180.

similar controversy arose in Chile.[173] Decision no. 24 was originally adopted by Decree no. 482 of the Minister of Foreign Affairs. The Contraloría General of Chile thereupon invalidated the decree on the ground that legislative approval was required. In consequence the President and cabinet confirmed the decree by an "Overriding Decree" (Decreto de Insistencia), Decree no. 488 of 39 June 1971.

The constitutional difficulties in Colombia were finally resolved by the passage of Law no. 8a of 21 March 1973[174] which granted Congressional approval to the Agreement of Cartagena. The government was empowered to put into force such acts of the Commission or the Board which do not affect legislation and involve matters not within the province of the legislature. Conversely, acts which require legislation must be approved by Congress, unless legislative powers have been delegated to the government by prior statute. The President was invested until 31 Dec. 1973 with special powers to issue the necessary decrees for the application of Decisions no. 24, 37, 37A, 46-50 and 56, and with powers to approve decisions of the Commission covering specified matters after prior consent by a mixed parliamentary commission.

IV. Conclusion

The survey of the legal frameworks for integration governing the EEC, LAFTA and the Andean Group shows the importance of the proper juridical system for steady progress of the integrative process. Automatic and direct applicability of community rules, coupled with proper judicial control, seem to be an important, if not indispensable, ingredient of continuous development. Only in that fashion can integrative political moments be captured and stagnancy forestalled. This seems to be the lesson that deserves to be heeded by future schemes.

173. For a detailed account see Orrego Vicuña, supra n. 148 at 55-58. Ecuador had to provide for retroactive applicability; see Holguin, supra n. 148 at 231.

174. For the text see 13 *Derecho de la Integración* 226 (1973).